
No. 78-1789

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ARKANSAS LOUISIANA GAS COMPANY, *Petitioner*,

v.

FRANK J. HALL, W. E. HALL, JR., MRS. W. E. HALL, SR.,
THE H. M. HARRELL TESTAMENTARY TRUST, JAMES E.
HARRELL, JOHN K. HARRELL, SR., ASA BENTON ALLEN, SID-
NEY G. MYERS, JR., W. O. COCHRAN, THOMAS F. PHILYAW,
MRS. ELAINE ALLEN, JAMES A. NOE, D. B. MCCONNELL, MRS.
EVA L. WEISS, SOL KAPLAN AND NATIONAL AMERICAN BANK,
New Orleans, Co-Testamentary Executors of the SUCCESSION
of SEYMOUR WEISS, *Respondents*.

**ON PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF LOUISIANA**

**BRIEF FOR
NORTHERN NATURAL GAS COMPANY
AS AMICUS CURIAE**

EDWARD KLIEWER, JR.

2210 Mercantile Bank Building

Dallas, Texas 75201

*Counsel for Northern Natural Gas
Company, amicus curiae.*

Of Counsel:

DEAN W. WALLACE

PATRICK J. MCCARTHY

2223 Dodge Street

Omaha, Nebraska 68102

STEPHEN R. ANDERTON

KLIEWER AND HOOD

2210 Mercantile Bank Building

Dallas, Texas 75201

(214) 747-8875

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BRIEF FOR
NORTHERN NATURAL GAS COMPANY
AS AMICUS CURIAE

Pursuant to Rule 36 of the Rules of this Court, Northern Natural Gas Company (Northern), as *amicus curiae*, respectfully submits this Brief in support of the Petitioner, Arkansas Louisiana Gas Company (Arkla). The written consent of all parties to the filing of this Brief is filed separately. All emphasis herein is added.

I.

INTEREST OF THE AMICUS CURIAE

Northern is appellee in an action involving the same basic issue as the instant case, *Atlantic Richfield Company v. Northern Natural Gas Company*, No. 78-1112, (*Atlantic Richfield*) pending in the United States Court of Appeals for the Fifth Circuit.

As reflected by the District Court's Memorandum Opinion and Order (appended to Arkla's Petitioner's Brief on the Merits at page 19a), *Atlantic Richfield* is an action by Atlantic Richfield against Northern for damages for alleged breach of contract; the failure to pay the higher rate triggered by the "favored nations" clause of a gas purchase contract between the parties. Reasoning that Atlantic Richfield, admittedly a "natural-gas company" under the *Natural Gas Act*, 52 Stat. 821, as amended, 15 U.S.C. § 717, *et seq.*, could not lawfully raise its rates to Northern without Federal Power Commission, now Federal Energy Regulatory Commission (the "Commission") approval, that Atlantic Richfield never obtained Commission approval of the higher rate for the period in question, September 23, 1973 to April 26, 1975, and that the Commission was without authority to grant reparations, Judge Higginbotham concluded that, however Atlantic Richfield may label its claim, it sought an impermissible retroactive increase in rates and, accordingly, sustained Northern's motion to dismiss. Atlantic Richfield appealed.

After oral argument, the Fifth Circuit on December 5, 1979, entered an order (Appendix, Page 1A) withholding the opinion in *Atlantic Richfield*

"* * * pending outcome of the petition for certiorari filed in the Supreme Court in *Hall v. Arkansas Louisiana Gas*, 368 So.2d 934."

Northern's position in *Atlantic Richfield* is essentially the same as Arkla's position in the instant action with, however, one exception: *Atlantic Richfield*, unlike this case, does not involve the question whether a "small producer", exempt by 18 C.F.R. § 157.40 from the rate increase filing requirements of Section 4(d) of the *Natural Gas Act*, may judicially recover a retroactive rate increase. As found by the District Court in *Atlantic Richfield*, Atlantic Richfield was at all times subject to such filing requirements of the *Natural Gas Act*. Northern, as *amicus curiae*, therefore addresses the question whether the Louisiana state court properly granted to Respondents a judicial recovery of a retroactive rate increase for gas purchased by Petitioner during the period 1961-October, 1972, during which period Respondents were admittedly *not* "small producers".

II.

SUMMARY OF NORTHERN'S ARGUMENT

1. As the sale of Respondents' gas was "a sale in interstate commerce of natural gas for resale", Respondents, with respect to such sale, are a "natural-gas company" under the *Natural Gas Act* (52 Stat. 821, as amended, 15 U.S.C. § 717, *et seq.*) and an "independent producer" under the Commission's Regulations (18 C.F.R. § 154.91(a)). Respondents therefore could not lawfully demand and receive nor could Arkla lawfully pay a "rate" (*i.e.*, price) for Respondents' gas in excess of the "just and reasonable" rate determined by the Commission.

2. Absent approval by the Commission, Respondents could not lawfully demand or receive, nor could Arkla lawfully pay for gas purchased from Respondents during the period 1961-October, 1972 the increased rate triggered by the favored nations clause of the contract. Respondents

did not seek prospective approval of such rate increase by the Commission and retroactive approval has been denied by the Commission.

3. The Louisiana state court had no jurisdiction to determine, for Respondents' gas purchased by Arkla during the period 1961-October, 1972, a just and reasonable rate different from Respondents' filed rate. Therefore, the Louisiana state court could not grant to Respondents a judgment for the difference between the filed rate and the higher favored nations clause rate, because that would necessarily require a judicial determination of a just and reasonable rate different from the filed rate; a determination which the Louisiana state court had no jurisdiction to make. Jurisdiction cannot be supplied by categorizing Respondents' action as one for damages for breach of contract. No matter how the suit is cast, the subject matter is the same — Respondents seek recovery of the excess of the favored nations clause rate over the filed rate.

4. The judgment of the Louisiana Supreme Court should, therefore, be reversed, at least with respect to gas purchased by Arkla during the period 1961-October, 1972.

III.

ARGUMENT

1. The Natural Gas Act and the Commission's Regulations

Section 2 of the *Natural Gas Act* (52 Stat. 821) defines "natural-gas company" to mean

"* * * a person engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale."

Section 4 of the *Natural Gas Act* provides in pertinent part:

"(a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the sale of natural gas subject to the jurisdiction of the Commission, shall be just and reasonable, and any such rate or charge that is not just and reasonable is declared to be unlawful.

" * * *

"(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time * * * and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any * * * sale subject to the jurisdiction of the Commission, * * * together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

"(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, * * * except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for * * *.

"(e) Whenever any such new schedule is filed the Commission shall have authority * * * to enter upon a hearing concerning the lawfulness of such rate, charge * * *. At any hearing involving a rate or charge sought

to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company * * *."

The *Department of Energy Organization Act* (91 Stat. 565) established (Sec. 204) the Federal Energy Regulatory Commission and transferred to the Commission [Sec. 402(a)(1)(c)] the functions of the Federal Power Commission under Sec. 4 of the *Natural Gas Act*.

18 C.F.R. § 154.91(a) of the Commission's Regulations defines an "independent producer" as

"* * * any person as defined in the Natural Gas Act who is engaged in the production or gathering of natural gas and who sells natural gas in interstate commerce for resale * * *".

18 C.F.R. § 154.93 of the Regulations defines "rate schedule" to mean

"* * * the basic contract and all supplements or agreements amendatory thereof, * * * showing the service to be provided and the rates and charges * * * applicable to the transportation of natural gas in interstate commerce or the sale of natural gas in interstate commerce for resale subject to the jurisdiction of the Commission * * *".

18 C.F.R. § 154.92 of the Regulations provides in pertinent part:

"(b) Every independent producer who, subsequent to the effective date of this part [June 7, 1954] proposes to initiate an interstate transportation or sale of natural gas subject to the jurisdiction of the Commission to an existing or new customer shall file with the Commission not less than 30 days nor more than 90 days

prior to the date such transportation or sale is proposed to be initiated a rate schedule, as defined in §154.93, setting forth the terms and conditions of service and all rates and charges for such transportation or sale. * * *

It is undisputed that, as required by the Regulations, Respondents filed the gas purchase contract, containing the favored nations clause involved in this action, with the Commission as Respondents' F.P.C. Gas Rate Schedule No. 4.

18 C.F.R. § 154.94 of the Regulations, prescribing the procedures required in order to change any rate or charge, provides in pertinent part:

"(a) No change shall be made in any rate, charge, or service in effect on and after June 7, 1954, for the interstate transportation or sale of natural gas in interstate commerce subject to the jurisdiction of the Commission by any independent producer required to file rate schedules pursuant to §154.92, without first filing a change in rates pursuant to Section 4(d) of the Natural Gas Act and in accordance with this section.

"(b) * * * every change in any rate schedule, rate, charge, classification or service effective or applicable to a sale subject to the jurisdiction of the Commission * * * shall be filed with the Commission by an original and three copies not less than 30 days nor more than 90 days prior to the date such change in rate schedule is proposed to be made effective.

"(c) The operation of any provision of the rate schedule providing for future or periodic changes in the rate, charge, classification, or service * * * shall constitute a change in rate schedule."

2. The Louisiana State Court Had No Jurisdiction

The Louisiana state court had no jurisdiction to grant to Respondents recovery of the excess of the favored nations rate over the filed rate during the period 1961 — October, 1972, because that constituted a determination of a just and reasonable rate, a determination which the Louisiana state court had no jurisdiction to make. *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246 (1951); *Socony Mobil Oil Co., et al. v. Brooklyn Union Gas Co., et al.*, 299 F.2d 692 (5th Cir.), *cert. den.*, 371 U.S. 887 (1962); *Mississippi Power & Light Co. v. Memphis Natural Gas Co.*, 162 F.2d 388 (5th Cir.), *cert. den.*, 332 U.S. 770 (1947).

In *Montana-Dakota Utilities Co.* the plaintiff-petitioner, without any reference to the Commission, sought to recover judicially that part of the filed rate under the *Federal Power Act*, 16 U.S.C. 791a, *et seq.* (identical in material respects to the *Natural Gas Act*) claimed to have been fraudulently collected. This Court, in holding that the District Court was without jurisdiction and that the plaintiff-petitioner was without a remedy under the *Federal Power Act*, said (341 U.S. 250-251):

“Petitioner gives its case a different cast by alleging that * * * its predecessor was deprived of its independence and power to resort to its administrative remedy. But the problem is whether it is open to the courts to determine what the reasonable rates during the past should have been. The petitioner, in contending that they are so empowered, and the District Court, in undertaking to exercise that power, both regard reasonableness as a justiciable legal right rather than a criterion for administrative application in determining a lawful rate. Statutory reasonable-

ness is an abstract quality represented by an area rather than a pinpoint. It allows a substantial spread between what is unreasonable because too low and what is unreasonable because too high. To reduce the abstract concept of reasonableness to concrete expression in dollars and cents is the function of the Commission. It is not the disembodied 'reasonableness' but that standard when embodied in a rate which the Commission accepts or determines that governs the rights of buyer and seller. A court may think a different level more reasonable. But the prescription of the statute is a standard for the Commission to apply and, independently of Commission action, creates no right which courts may enforce.

"Petitioner cannot separate what Congress has joined together. It cannot litigate in a judicial forum its general right to a reasonable rate, ignoring the qualification that it shall be made specific only by exercise of the Commission's judgment, in which there is some considerable element of discretion. *It can claim no rate as a legal right that is other than the filed rate, whether fixed or merely accepted by the Commission, and not even a court can authorize commerce in the commodity on other terms.*

"We hold that the right to a reasonable rate is the right to the rate which the Commission files or fixes, and that, except for review of the Commission's orders, the courts can assume no right to a different one on the ground that, in its opinion, it is the only or the more reasonable."

In *Socony Mobil Oil Co. v. Brooklyn Union Gas Co.*, *supra*, *Brooklyn Union, et al.*, sued *Socony Mobil, et al.*, to require refund of contract prices received by the defend-

ants for gas which were in excess of defendants' contract rates on June 7, 1954 [date of the decision in *Phillips Petroleum Co. v. Wisconsin*, et al., 347 U.S. 672 (1954)]. The higher prices were received by defendants under the cover of orders (later vacated) staying enforcement of Commission Orders 174 and 174-A, which adopted regulations controlling and regulating rates for sales of jurisdictional gas, essentially the same regulations discussed on pages six and seven hereof. Defendants argued that the rates collected during the stay orders were legal and proper.

The Fifth Circuit disagreed (299 F.2d 695) :

"The stay orders cannot be construed as protecting Mobil and Ohio et al in the retention of the overcharges for two reasons: (1) this court does not have the authority to establish rates, and to construe the stay orders as approval of the increased rates would be to impute to the court the doing indirectly what the court could not do directly; and (2) although the stay orders, until dissolved, supported Mobil and Ohio's et al action in collecting the proposed rate for the time being, in the sense that the Commission was restrained from preventing them from making such collections, the stay orders did not attempt to, they could not, obviate the necessity of filing them in accordance with the statute and the regulations of the Commission. * * *

"* * * This court did not, indeed could not, authorize an increase in the lawful rates. * * *"

The Fifth Circuit went on to hold that rate changes, such as the rate increases granted to Respondents by the Louisiana state court, are forbidden absent compliance with the filing provisions of the *Natural Gas Act* and the Commission's Regulations (299 F.2d 694) :

“ * * * Any rate changes provided for in the contract, whether by virtue of a ‘favored nations’ or ‘escalation’ clause or otherwise, constitute rate changes under the Natural Gas Act and are forbidden in the absence of compliance with the filing provisions of the Act and the regulations of the Commission.”

Mississippi Power & Light Co. v. Memphis Natural Gas Co., 162 F.2d 388 (5th Cir.), *cert. den.*, 332 U.S. 770 (1947), is also closely analogous to the present case. There, the gas purchase contract under which Memphis sold gas to Mississippi contained the following favored nations clause (162 F.2d 388) :

“ * * * It is understood and agreed that if at any time during the continuance of this agreement the Seller shall make any delivery of gas to other than the Buyer at prices *lower* than the prices provided for in this Article Fourth for similar amounts of gas and under similar conditions, the Buyer shall be entitled to purchase gas hereunder at prices as favorable to the Buyer as the prices provided for in any such contract or contracts.”

During the period November 1, 1942 to July 26, 1943, Memphis sold gas to Arkansas Power & Light Company at a lower rate which, during said period would have saved Mississippi about \$30,000 under the favored nations clause. Mississippi deducted this \$30,000 from subsequent billings by Memphis, and Memphis sued for the \$30,000. It developed that during the period from July, 1939 to July 25, 1943, Memphis sold gas to the City of Memphis at an even lower rate than the mentioned sales to Arkansas Power & Light Company, which lower rate to the City of Memphis would, if applied to sales to Mississippi, have saved \$227,951

under the favored nations clause. Mississippi filed a counterclaim to recover this \$227,951.

During pendency of the suit, Mississippi, on April 11, 1945, filed with the Commission a complaint to determine "the just and reasonable rate for gas delivered * * * by Memphis to Mississippi during the period from June 21, 1938 to July 26, 1943, fixing the same by order". (162 F.2d 389). The Commission ruled that it was without authority to grant the relief because, in substance, the Commission can only fix rates prospectively and not retroactively, and because (162 F.2d 389):

"During the period from June 21, 1938, to July 26, 1943, Mississippi filed no protest or complaint with the Commission with respect to the rates charged by Memphis for natural gas sold to Mississippi. During such period, the rates charged by Memphis were regularly on file with the Commission, and the Commission did not fix any rates or charges different from those prescribed on Memphis' rates schedules actually on file with the Commission."

The trial court granted judgment for Memphis (162 F.2d 389-90):

" * * * on the grounds that (1) the 'favored nation' clause would give Mississippi no more than the right to use it as the basis for complaint to the Commission. (2) Memphis was under no obligation to ask the Commission to implement a rate to Mississippi already granted to another distributor of Memphis. (3) Until the Commission changed the rate, the contract rate between Memphis and Mississippi was the lawfully promulgated rate."

On appeal Mississippi contended that the trial court erred because, among other things (162 F.2d 390):

"2. It overlooked the facts as shown by the record that Mississippi did not know of the rate reduction to Arkansas until almost two months thereafter, and did not know all of the facts and circumstances surrounding such reductions until some time later; that it immediately protested and was assured by Memphis that its rates under the 'favored nation' clause would be given due consideration, and it was requested by Memphis to defer action, pending the general rate investigation of the Memphis rate structure as a whole then in process by the Federal Power Commission."

In affirming the judgment, the Fifth Circuit held that (162 F.2d 390):

"The 'favored nation' clause became inoperative after the passage of the Natural Gas Act. • • •"

because Section 4 of the *Natural Gas Act* prescribes the only manner in which rates may be changed — by appropriate filings with and approval by the Commission. The court, in rejecting Mississippi's contention that the failure of Memphis to file a lower rate with the Commission entitled Mississippi to recover the advantages of the lower rate in a breach of contract suit, said (162 F.2d 390-391):

"• • • No matter how Mississippi may contort the effect of the 'favored nation' clause, the act places upon the 'gas distributing company', here Mississippi, or the Commission itself the power of instituting a hearing to determine whether a rate is proper under the terms of the act. Under section 5 the Commission may consider discrimination and preference in setting a rate. Rate-making is a legislative function that the

courts will not interfere with, at least until the Commission has exercised the function. To give effect to the 'favored nation' clause would operate to transfer the legislative function of rate-making from the Commission to the courts. For the court to place a contractual duty on Memphis to file a new rate schedule would be tantamount to forcing new rates on Memphis without permitting its recourse to the Commission."

Finally, in answer to Mississippi's complaint that, because the Commission cannot set rates retroactively, it would be necessary that Mississippi have instantaneous knowledge of the lower rate charged by Memphis, the Fifth Circuit held (162 F.2d 391):

"Mississippi argues that, since the Commission has held it may not set retroactive rates, to require it to go before the Commission to obtain a lower rate in advance of deliveries would require it to have instantaneous knowledge of the lower rate extended by Memphis to another customer and would require the Commission to obtain immediate action. Congress has made certain provisions for these hardships, and supplication for further relief must be addressed to that body.
• • •"

That the doctrine of *Montana-Dakota Utilities Co.* and similar cases discussed above applies here is emphasized by the Commission's November 5, 1980 Order in Docket No. RI76-28, denying Respondents' application for waiver of the filing requirements of the *Natural Gas Act* and the Commission's Regulations (App., pp. 1a-15a, to Supplemental Memorandum for the United States and the Federal Energy Regulatory Commission as *amici curiae*).

That Respondents' favored nation clause does not create a cause of action independent of the *Natural Gas Act* and

the Commission's Regulations is further confirmed by *Wisconsin, et al. v. Federal Power Commission, et al.*, 373 U.S. 294 (1963). That case involved, among other things, the effect of "spiral escalation clauses" contained in certain contracts under which Phillips Petroleum Company sold natural gas. Under these spiral escalation clauses, when a specified commodity price index increased more than a certain number of points and the purchaser had obtained a general increase in its resale rate for the gas, the rates at which Phillips sold gas to that purchaser could be increased. The net effect of such spiral escalation clauses was substantially the same as Respondents' favored nations clause. Concerning the effect of the spiral escalation clauses this Court said (373 U.S. 304):

" * * * The effect of a contract clause of this type, of course, is only to permit the producer to resort to the filing provisions of § 4(d) of the Act. If the increase is challenged, the producer must still establish its lawfulness wholly apart from the terms of the contract. * * * "

This is but another way of stating what this Court said in *Montana-Dakota Utilities Co.*, i.e., "Petitioner cannot separate what Congress has joined together." (341 U.S. 251).

This Court has made very clear that the doctrine of *Montana-Dakota Utilities Co.* is not diluted by cases finding the existence of an implied, private cause of action to support statutory rights, *Cannon v. University of Chicago, et al.*, 441 U.S. 677 (1979), or by cases applying the abstention doctrine, *United States v. Michigan National Corp., et al.*, 419 U.S. 1 (1974). In *Cannon*, in which an implied, private cause of action was found to exist under Title IX of the Education Amendments of 1972 (20 U.S.C.S. § 1681, *et. seq.*), this Court, after discussing certain statutes which it

had construed to create private remedies, pointed out (441 U.S. 690):

“The language in these statutes — which expressly identifies the class Congress intended to benefit — contrasts sharply with statutory language customarily found in * * * other laws enacted for the protection of the general public. * * *

The Court expanded on this distinction in its footnote 13 (441 U.S. 690):

“Conversely, the Court has been especially reluctant to imply causes of action under statutes that create duties on the part of persons for the benefit of the public at large. See * * * *T.I.M.E., Inc. v. United States*, 359 U.S. 464 * * * (‘duty of every common carrier . . . to establish . . . just and reasonable rates . . .’); *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246 * * * (similar duty of gas pipeline companies). * * *

In *United States v. Michigan National Corp., et al.*, this Court, in holding that the action at hand was an appropriate one for application of the abstention doctrine, pointedly distinguished that case from the instant case. In its Footnote 2 (419 U.S. 4) the Court said:

“2. We may put to one side cases * * * in which Congress, by depriving the agency of a remedy, is deemed to have withheld it from the courts as well, e.g., *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.* 341 US 246 * * * (1951). *In such cases, the court must of course dismiss the action.*”

The Natural Gas Act and the Commission’s Regulations having been enacted and adopted in the public interest [to

the above authorities may be added *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968), *reh. den.*, 392 U.S. 917 (1968)], establish a public policy which precluded the Louisiana state court from granting to Respondents the recovery sought for the period 1961-October, 1972, and that public policy cannot be avoided by private contract or Arkla's breach thereof. *Montana-Dakota Utilities Co.*, *supra*; *Brooklyn Savings Bank v. O'Neill*, 324 U.S. 697 (1944); *Midstate Horticultural Co., Inc. v. Pennsylvania R.R. Co.*, 320 U.S. 356 (1943); *Scott Paper Co. v. Marcalus Manufacturing Co., Inc.*, 326 U.S. 249 (1945).

Pan American Petroleum Corp., et al. v. Superior Court of the State Delaware in and for Newcastle County, et al., 366 U.S. 656 (1961) is not to the contrary and does not support the proposition for which the Louisiana Supreme Court cites it (368 So.2d 989), namely, that contract violations are not subject to the Commission's jurisdiction. *Pan American Petroleum Corp.* simply restated the settled rule that the question of federal question jurisdiction is to be determined from the allegations of the plaintiff's complaint; if the action is cast as a breach of contract suit, there is no federal question jurisdiction even though the defendant, as does Arkla here, has a defense based on the *Natural Gas Act* and the Commission's Regulations.

Of course the Commission has no jurisdiction to award reparations-damages for breach of contract. But it is equally clear, under the above authorities, that the Louisiana state court, when Arkla pleaded and proved the filed rate doctrine as a defense, was also without jurisdiction to grant a judgment for damages for breach of contract.

As the Louisiana Supreme Court observed, the *Natural Gas Act* does not "abrogate private gas purchase contracts" (368 So.2d 984). But *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956), cited by the Loui-

siana Supreme Court, does not support, but negates, that court's conclusion that an award of damages for Arkla's breach of contract was properly made despite the failure of Respondents-Plaintiffs to comply with the Commission's Regulations. The *Natural Gas Act* contemplates a system of private contracting, but that system must function, and the enforcement of the rights and obligations of the contracting parties must be in conformity, with the public interest, as defined in the *Natural Gas Act* and the Commission's Regulations. *Permian Basin Area Rate Cases*, 390 U.S. 747, *reh. den.*, 392 U.S. 917 (1968). There, this Court, in upholding the validity of the Commission's order limiting the application of favored nations, spiral escalation and price redetermination clauses (even when supported by rate increase filings as required by the Commission's Regulations) to prices no higher than the area maximum rates, held (390 U.S. 783-84):

"We think that the Commission did not exceed or abuse its authority. Section 5(a) provides without qualification or exception that the Commission may determine whether 'any rule, regulation, practice, or contract affecting . . . [any] rate . . . is unjust, unreasonable, unduly discriminatory, or preferential . . .,' and prescribe the 'rule, regulation, practice, or contract to be thereafter observed . . .'. Although the *Natural Gas Act* is premised upon a continuing system of private contracting, *United Gas Co. v. Mobile Gas Corp.*, *supra*, the Commission has plenary authority to limit or to proscribe contractual arrangements that contravene the relevant public interests. * * * We need not, for present purposes, calculate what collateral consequences, if any, the Commission's order may have for the terms or validity of the contracts it reaches; we hold only that the Commission has here

permissibly restricted the application of indefinite escalation clauses."

That Respondents, for the period 1961-October, 1972, are left without a remedy for Arkla's breach of contract is not unusual; that result is entirely predictable and, as demonstrated by the above authorities, it is the law as announced by this Court. Which, in the final analysis, brings us back to *Montana-Dakota Utilities Co.* (341 U.S. 254):

"If the court is presented with a case it can decide but some issue is within the competence of an administrative body, in an independent proceeding, to decide, comity and avoidance of conflict as well as other considerations make it proper to refer that issue. But we know of no case where the court has ordered reference of an issue which the administrative body would not itself have jurisdiction to determine in a proceeding for that purpose. The fact that the Congress withheld from the Commission power to grant reparations does not require courts to entertain proceedings they cannot themselves decide in order indirectly to obtain Commission action which Congress did not allow to be taken directly. There is no indication in the Power Act that that was Congress' intent.

*"It is urged that this leaves petitioner without a remedy under the Power Act. We agree. * * *"*

IV.

CONCLUSION

Northern submits that the Court should reverse the judgment of the Supreme Court of the State of Louisiana, at least insofar as that judgment grants to Respondents a recovery of a rate in excess of the filed rate for gas sold to Petitioner during the period 1961-October, 1972.

Respectfully submitted,

EDWARD KLIEWER, JR.
2210 Mercantile Bank
Building
Dallas, Texas 75201

*Counsel for Northern
Natural Gas Company,
amicus curiae.*

Of Counsel:

DEAN W. WALLACE
PATRICK J. MCCARTHY
2223 Dodge Street
Omaha, Nebraska 68102

STEPHEN R. ANDERTON
KLIEWER AND HOOD
2210 Mercantile Bank Building
Dallas, Texas 75201
(214) 747-8875

APPENDIX

United States Court of Appeals

FIFTH CIRCUIT

Gilbert F. Ganucheau
Clerk

OFFICE OF THE CLERK

December 5, 1979

Tel. 504—589-6514
600 Camp Street
New Orleans, LA. 70130

TO ALL COUNSEL OF RECORD

No. 78-1112 — *Atlantic Richfield Company v Northern
Natural Gas Company*

Dear Counsel:

Please be advised, that the opinion in the above referenced case will be withheld pending outcome of the petition for certiorari filed in the Supreme Court in *Hall v Arkansas-Louisiana Gas*, 368 So.2d 984.

Very truly yours,

GILBERT G. GANUCHEAU, *Clerk*

By S/RICHARD E. WINDHORST, JR.

Richard E. Windhorst, Jr., *Chief
Judicial Support Division*

REW :mlv

MESSRS. JAMES R. COFFEE AND
ALBERT D. HOPPE

MESSRS. EDWARD KLIEWER, JR. AND
STEPHEN R. ANDERTON

MR. PATRICK J. MCCARTHY